May 21, 1999

Senate Says Public Schools Can Use Religious Speech To Honor Their Dead

On May 18, 1999, the U.S. Senate adopted an amendment that will help public schools to honor those who have been murdered on their campuses. By a vote of 85-to-13, the Senate adopted the Allard-Lott-Craig-Helms-Enzi Amendment which contains —

- A Congressional finding that the design and construction of any memorial that is placed on the campus of a public school in order to honor the memory of any person slain on that campus may use religious symbols, motifs, or sayings without violating the First Amendment to the Constitution.

- A Congressional finding that the saying of a prayer, the reading of a scripture, or the performance of religious music at a memorial service that is held on the campus of a public school in order to honor the memory of any person slain on that campus does not violate the First Amendment.

- An authorization for the U.S. Attorney General to provide legal assistance to any agency that has to defend the constitutionality of a memorial or memorial service, and a requirement that each party to any lawsuit involving a memorial or memorial service pay its own attorneys' fees and costs.

Of course, the Senate took no position on the kind of memorial or memorial service that would be appropriate — that decision is for the community. The Senate did say, however, that a memorial or memorial service may use religious speech or symbols without violating the Constitution. The Senate's action was most timely. Consider the following story from the *Associated Press* of May 8, 1999:

Park managers ban religious symbols at public Columbine High memorial

Littleton, Colo. (AP) — The 13 wooden crosses erected at Clement Park in memory of the victims of the Columbine High School massacre are coming down — again.

Park managers say there will be no religious symbols allowed in any permanent memorial at the park, include the controversial 6-foot

crosses which were resurrected this week after previously being torn down.

It is a public place and therefore must remain secular, according to [the] manager of the Foothills Park and Recreation District.

Since the April 20 school rampage that claimed 15 lives, makeshift memorials have sprouted up all around Clement Park, which is adjacent to the school. * * * *

[A representative] of the Freedom from Religion Foundation sent a letter of complaint to Foothills [Park] this week. He said he doesn't want a "monstrous Christian-oriented memorial" at the public park. "I understand on one level that people are grieving," he said. "But any kind of religious display on public property violates separation of church and state." * * * *

In the *Associated Press* story, the park manager gave a rendition of church-state relations that probably is common among managers of public parks. The representative of the Freedom From Religion Foundation gave an opinion that is typical of what might be called the radical separationists — and he should know. The Colorado chapter of the Freedom From Religion Foundation has unsuccessfully sued to censor the national motto and to have "In God We Trust" removed from U.S. coins and currency, 74 F.3d 214 (10th Cir. 1996); has unsuccessfully sued to keep the Pope from celebrating Mass at a State park during World Youth Day, 921 P.2d 84 (Colo. Ct. Apps. 1996); and has unsuccessfully sued to remove from a park near the State Capitol a monument containing the Ten Commandments, 898 P.2d 1013 (Colo. S. Ct. 1995).

But the United States Senate, an institution that begins each workday with a prayer, does not hold a radical separationist view, and it has now gone on record in support of allowing religious speech when honoring those who have died violently in public schools. The vote was bipartisan and nonideological.

The Senate has given its institutional opinion on the meaning of the Constitution. The Congress of the United States, as much as the courts of the United States, is entitled, and duty-bound, to interpret the Constitution of the United States. As shown in the attached Appendix, Congress and the Presidency have a long history of independent constitutional interpretation.

With the Allard-Lott-Craig-Helms-Enzi Amendment the U.S. Senate has interpreted the First Amendment consistent with the best traditions of the American Republic and the good sense of the American people. If the people of Littleton or other sites of school-yard murders believe that religious speech is necessary to honor their dead, then the First Amendment erects no barrier to those most profound and moving expressions of the human heart.

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Appendix
Congress as Interpreter of the Constitution

". . . The popular press treats United States Supreme Court rulings as definitive, law school casebooks typically identify constitutional law as the work of the Court, and when . . . [former] Attorney General Edwin Meese argues that Supreme court decisions are not 'binding on all persons and parts of government,' editorialists and representatives of the *Washington Post*, *New York Times*, and American Bar Association are sent into a state of apoplexy. Among legal academics, however, it is now commonplace to discuss constitutional law as something larger and more complex than merely court rulings. . . ." Neal Devins and Louis Fisher, "Judicial Exclusivity and Political Instability," 84 *Virginia Law Review* 83, 83-4 (1998) (footnotes omitted).

"For its part, Congress has launched numerous challenges to the Court. In response to *Dred Scott*, Congress passed a bill prohibiting slavery in the territories. Disagreeing with the Court's 1918 ruling that the commerce power could not be used to regulate child labor, Congress two decades later again based child labor legislation on the commerce clause. Public accommodations protections contained in the 1964 Civil Rights Act similarly followed in the wake of a Supreme Court decision rejecting such protections. More recently, lawmakers have challenged Court rulings on abortion, busing, flag burning, religious freedom, voting rights, and the legislative veto." *Id.* at 89 (footnotes omitted).

"[President] Lincoln refused to defer to *Dred Scott* and to allow it to set the moral tone and political direction of the United States. At stake was not an abstract or technical question of law but rather the future of the country. Every citizen had a duty to express opinions and help shape the contours of constitutional structures and rights. 'Like politics, with which it was inextricably joined, the Constitution was everybody's business.' To Lincoln, the Supreme Court was a coequal, not superior, branch of government. The Court existed as one branch of a political system, subject to a combination of checks and balances, including the force of public opinion. Thus, in his inaugural address in 1861, he denied that constitutional questions could be settled solely by the Supreme Court. If government policy on 'vital question affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers. . . .' Congress and the President were free to reach their own constitutional judgments, even if at odds with past Court rulings, and then let the Court decide again." Louis Fisher, "Constitutional Interpretation by Members of Congress," 63 *North Carolina Law Review* 707, 714 (1985) (footnotes omitted).

"No justification exists to defer automatically to the judiciary because of its technical skills and political independence. Each decision by a court is subject to scrutiny and rejection by private citizens and public officials. What is 'final' at one stage of our political development may be reopened at some later date, leading to revisions, fresh interpretations, and reversals of Supreme Court doctrines. Members of Congress have both the authority and the capability to participate constructively in constitutional interpretation. Their duty to support and defend the Constitution is not erased by doubts about personal or institutional competence. Much of constitutional law depends on factfinding and the balancing of competing values, areas in which Congress justifiably can claim substantial expertise." *Id.* at 747.